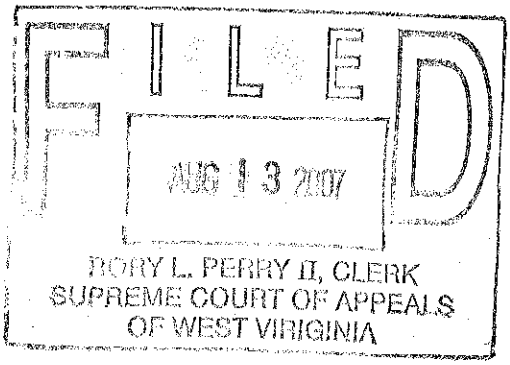
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**
**AT CHARLESTON**
**Appeal No. 33514**




***IN RE* THE MARRIAGE OF:**

**CONNIE SUE WHITESIDE**
**n/k/a Connie Sue Varney,**

Appellant,

**v.**

Appeal to Circuit Court of Kanawha County
Civil Action No. 01-D-179
From the Family Court of Kanawha County
Civil Action No. 01-D-179

**MICHAEL B. WHITESIDE and**
**EQUITY HOLDINGS, LLC,**

Appellees.

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# APPEAL BRIEF FOR CONNIE SUE WHITESIDE

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**CONNIE SUE WHITESIDE**
**n/k/a Connie Sue Varney,**
By Counsel,

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## PROCEDURAL HISTORY AND NATURE OF RULING IN THE CIRCUIT COURT AND FAMILY COURT

This matter comes before the Court following the Circuit Court of Kanawha County's denial of an appeal by Appellant, Connie Sue Whiteside, now known as Connie Sue Varney, ("Appellant" or "Ms. Varney") from the decision of the Family Court of Kanawha County, denying the Ms. Varney's Motion to Set Aside Transfer of Property to Third Party and Enforce Final Order ("Motion to Set Aside") and granting Appellee, Equity Holdings, LLC's, Amended Motion to Dismiss ("Motion to Dismiss").

At issue in the motions and the instant appeal is title to a one-half undivided interest in 19 acres of real property in the Wildwood Addition, Union District, Charleston, West Virginia ("Property") that Ms. Varney and her ex-husband, Michael B. Whiteside, acquired in 1996. (See Deed from Higginbotham to Whiteside dated Apr. 8, 1996 ("Whiteside Deed")). In 2000, Ms. Varney and Mr. Whiteside filed a voluntary petition under Chapter 7 of the Bankruptcy Code. In 2001, Ms. Varney filed the underlying action for divorce from Mr. Whiteside. In her divorce petition, Ms. Varney requested that the Family Court divide the couple's property accumulated during the marriage. (See Petition for Divorce).

The Family Court in its Final Order entered February 1, 2005, ordered Mr. Whiteside to execute a deed conveying his one-half interest in the Property to Ms. Varney. (See Final Order). The Family Court's Final Order notes that Mr. Whiteside, at the final hearing held on January 5, 2005, stated on the record that he had no objection to executing a deed conveying his interest in the Property to Ms. Varney. (Id.). However, after the inception of the divorce action but prior to the entry of the Final Order, Mr. Whiteside conveyed his interest in the Property to Respondent, Equity Holdings, LLC ("Equity Holdings"), on July 23, 2004, for $6,000. (See Deed from Michael Whiteside to Equity Holdings ("Equity Holdings Deed")).

After learning that Mr. Whiteside had previously transferred his interest to Equity Holdings, Ms. Varney filed a Motion in the Family Court seeking to set aside the transfer and to enforce Final Order. Equity Holdings intervened and responded with its Motion to Dismiss. The Family Court, by Order entered November 29, 2006, denied Ms. Varney's Motion to Set Aside and granted Equity Holdings' Motion to Dismiss. On December 7, 2006, Ms. Varney timely appealed the Family Court's erroneous decision to the Circuit Court of Kanawha County. Four days later, on December 11, 2006, Judge Tod J. Kaufman denied Ms. Varney's appeal and dismissed the case from the Court's docket. This Court granted Ms. Varney's Petition for Appeal. With the instant appeal, Ms. Varney respectfully requests that the Court reverse the Family Court's Order entered November 29, 2006, and set aside the transfer to Equity Holdings under W. Va. Code § 48-7-108.

## STATEMENT OF FACTS

On April 8, 1996, Ms. Varney and Mr. Whiteside, then a married couple, acquired lots 62, 63, 64, 95 and 96 compromising 19 acres, more or less, located at Wildwood Addition, Charleston, Kanawha County, West Virginia (the "Property") (See Whiteside Deed). The parties owned the property as joint tenants with the right of survivorship. (Id.) In 2000, Ms. Varney and Mr. Whiteside filed a Voluntary Petition under Chapter 7 of the Bankruptcy Code (Title 11 of the United States Code) in the United States Bankruptcy Court for the Southern District of West Virginia (Case No. 00-20891). In 2001, Ms. Varney, then Connie Sue Whiteside, filed a Petition for Divorce against Mr. Whiteside in the Family Court of Kanawha County, West Virginia. (See Petition for Divorce). In the Petition for Divorce, Ms. Whiteside requested that the Family Court divide the couple's property accumulated during the marriage, which included the Wildwood Addition Property. (Id.).

During the divorce action and the bankruptcy case, Arthur M. Standish, as Trustee of the Whiteside Bankruptcy Estate (the "Trustee"), filed a motion to sell the Property to Equity Holdings and Kent J. George, its principal. However, Ms. Varney submitted an upset bid, offering more money for the Property. (See Transcript of Bankruptcy Hearing dated Jan. 7, 2004 ("Transcript"), at 12-13, 18-19). At a hearing held on January 7, 2004, the Bankruptcy Court refused to approve the Trustee's motion to sell the Property to Equity Holdings. Equity Holdings was present at the January 7, 2004 hearing, both by counsel and its principal, Kent J. George.

During the hearing on the Trustee's motion, there was a discussion regarding Ms. Varney's upset bid. Ms. Varney's counsel explained that Ms. Varney intended to credit her bid for the Property against amounts that Mr. Whiteside owed to her in the divorce. (Transcript at 11-12). Equity Holdings protested, because it had already loaned $5,000 to Mr. Whiteside and argued that it should be repaid this $5,000 if Ms. Varney purchased the Property. . . The Bankruptcy Court disagreed, stating that "[y]ou don't have a $5,000 investment in this property. Equity Holding has a $5,000 investment in Mr. Whiteside". (Transcript, at 15).

Throughout the January 7, 2004 hearing, the fact that the parties were involved in a divorce proceeding was emphasized. Counsel for Equity Holdings acknowledged to the Bankruptcy Court that Equity Holdings and Mr. George were aware of the divorce action in their dealings with Mr. Whiteside. Counsel for Equity Holdings stated that "Mr. Standish specifically said, well, you have got to be careful, I think they are getting a divorce." (Id. at 19). As a further example, the deed between Mr. Whiteside and Equity Holdings included as an exhibit the Bifurcated Order from the Family Court granting the parties a divorce and scheduling equitable distribution for a final hearing. (See Equity Holdings Deed).

Therefore, based on Equity Holdings' presence at the January 7, 2004 bankruptcy hearing, Equity Holdings and its principal, Kent J. George, specifically knew that (i) the Whiteside divorce action was pending, (ii) Ms. Varney was asserting claims against Mr. Whiteside, and (iii) she intended to credit her claims against Mr. Whiteside in her bid for the Property. (See Transcript 17-19).

After the Bankruptcy Court denied the Trustee's Motion to Sell the Property, the Trustee abandoned his efforts to sell the Property and in fact, on July 19, 2004, gave notice of his intent to abandon this property as an asset of the bankruptcy estate pursuant to 11 U.S.C. §554. Unknown to Ms. Varney and without the approval of the Family Court or the Bankruptcy Court, Mr. Whiteside executed a deed on July 23, 2004, conveying his one-half interest in the Property to Equity Holdings for $6,000. Apparently, Equity Holdings paid an additional $1,000 to Mr. Whiteside, in addition to the $5,000 that it had loaned to him prior to the January 7, 2004 Bankruptcy Court hearing. The Equity Holdings Deed clearly indicates that Equity Holdings knew of the parties' divorce action. (See Equity Holdings Deed). Thus, Equity Holdings had actual notice of Ms. Varney's claim to equitable distribution prior to buying Mr. Whiteside's one-half interest in the property for $6,000.

Because the parties had recently completed a Chapter 7 bankruptcy case, the Family Court in its Final Order found that little property existed that was subject to equitable distribution. (See Final Order Finding of Fact and Conclusions of Law ¶ 5). However, the Family Court noted that there was "one piece of real estate subject to equitable distribution, that being lots 62, 63, 64,, 95 and 96 located at Wildwood Addition, Charleston, Kanawha County, West Virginia . . . ." (Id. ¶ 7). The court further noted that Ms. Varney sought an offset against Mr. Whiteside's interest in this Property for her redemption of the Property for non-payment of

taxes, her attorney fees for protecting her interest in the Property in the bankruptcy proceeding (i.e. by preventing a transfer that would defeat equitable distribution), and for one-half of the value of a grand piano previously sold by Mr. Whiteside. (Id.). The Family Court found that Ms. Varney was entitled to these off-sets against Mr. Whiteside's interest in the Property. (Id.). Accordingly, the Family Court in its Final Order entered February 1, 2005, ordered Mr. Whiteside to execute a deed conveying his one-half interest in the Property to Ms. Varney. (See Final Order).

The Family Court's Final Order notes that Mr. Whiteside, at the final hearing held on January 5, 2005, stated on the record that he had no objection to executing a deed conveying his interest in the Property to Ms. Varney. (Id.). However, prior to the entry of the Final Order, Mr. Whiteside had already conveyed his interest in the Property to Equity Holdings, on July 23, 2004. (See Equity Holdings Deed). Nevertheless, Mr. Whiteside had not updated his disclosure forms to indicate that the Property was no longer one of his assets. See W. Va. Code § 48-7-201 (requiring such updates to be made on the record to the date of the hearing). Thus, Mr. Whiteside misled the Family Court and Ms. Varney to believe that he still owned an interest in the Property. In the end, the Family Court calculated the parties' equitable distribution of the marital estate by including Mr. Whiteside's one-half interest in the Property as a part of the marital estate. (See Final Order).

After learning that Mr. Whiteside had transferred his interest in the Property prior to the entry of the Final Order, Ms. Varney filed a Motion to Set Aside Transfer of Property to Third Party and Enforce Final Order ("Motion to Set Aside") in the Family Court. Equity Holdings intervened and moved to dismiss Ms. Varney's motion. The Family Court, by Order entered November 29, 2006, denied Ms. Varney's Motion to Set Aside and granted Equity Holdings'

Motion to Dismiss, holding that Equity Holdings was a bona fide purchaser without notice of any fact or condition that would support setting aside the sale in this instance.

## ASSIGNMENTS OF ERROR AND MANNER DECIDED IN CIRCUIT COURT

The Circuit Court of Kanawha County erred by refusing to hear Ms. Varney's appeal of the Family Court's decision on the Motion to Set Aside. The Family Court erred in denying Ms. Varney's Motion to Set Aside the transfer of Property to Equity Holdings, and further by denying Ms. Varney's request to enforce the equitable distribution of the marital estate set forth in the February 1, 2005, Final Order, specifically:

1. The Family Court should have set aside the transfer of the Property and enforced its Final Order setting the terms of the equitable distribution to be made to Ms. Varney.

2. The Family Court should have found that Equity Holdings at the time of its purchase of Mr. Whiteside's interest in the Property, had actual notice of (i) the Whiteside divorce action, (ii) Ms. Varney's claims against Mr. Whiteside, and (iii) her intent to offset these claims against his interest in the Property in the divorce action, and thus Equity Holdings is not a bona fide purchaser; and

Therefore, Ms. Varney respectfully requests this Court to reverse the Order of the Family Court entered on November 29, 2006, and the Order of the Circuit Court of Kanawha County entered December 11, 2006, thereby setting aside the transfer of the Property to Equity Holdings and further, enforcing the equitable distribution as set forth in the Family Court's February 1, 2005, Final Order.

## STANDARD OF REVIEW

This Court addressed the standard of review governing this case in the Syllabus of Carr v. Hancock, 607 S.E.2d 803 (W. Va. 2004):

> In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law de novo.

Id. at Syl. Pt.

## DISCUSSION OF LAW

**PURSUANT TO WEST VIRGINIA CODE §§ 48-7-108 AND 48-7-304, THIS COURT SHOULD REVERSE THE ORDER OF THE FAMILY COURT, SET ASIDE THE TRANSFER OF THE PROPERTY TO EQUITY HOLDINGS, AND ENFORCE THE FINAL ORDER OF THE FAMILY COURT REGARDING EQUITABLE DISTRIBUTION BECAUSE EQUITY HOLDINGS WAS NOT A BONA FIDE PURCHASER WITHOUT NOTICE AND THE TRANSFER WAS EFFECTED TO AVOID MS. VARNEY'S RIGHT TO EQUITABLE DISTRIBUTION.**

In denying Ms. Varney's Motion to Set Aside and granting Equity Holdings' Motion to Dismiss, the Family Court abused its discretion in reaching the legal conclusion that Equity Holdings was a bona fide purchaser for value without notice. The undisputed facts show that Equity Holdings had actual notice of (i) the Whiteside divorce action, (ii) Ms. Varney's claim against Mr. Whiteside, and (iii) her intent to offset her claims against his interest in the Property as part of the divorce action. Because Equity Holdings had actual notice, it was not a bona fide purchaser without notice. As such, this Court should reverse the Family Court and enforce equitable distribution of the Property as originally determined by the Final Order of February 1, 2005.

West Virginia Code § 48-7-108 recognizes that a party to a divorce can sell property during the divorce action, unless the sale is made to avoid equitable distribution:

> ...as to any transfer prior to the entry of an order under the provisions of this article, **a transfer other than to a bona fide purchaser for value shall be voidable if the court finds such transfer to have been effected to avoid the application of the provisions of this article or to otherwise be a fraudulent conveyance.**

W. Va. Code § 48-7-108 (emphasis added).[1] Here, the circumstances show that Equity Holdings took a deed for the Property from Mr. Whiteside with actual knowledge of Ms. Varney's claims against him, and her intent to look to the Property to satisfy these claims. The undisputed facts in this case demonstrate that Equity Holdings had actual notice of these facts due to its presence at the January 7, 2004 Bankruptcy Court hearing. Therefore, Ms. Varney has the right to void the transfer to Equity Holdings because: (1) Equity Holdings was not a "bona fide purchaser"; and (2) Mr. Whiteside transferred his interest to Equity Holdings and Equity Holdings paid money to Mr. Whiteside to avoid Ms. Varney's equitable distribution rights. See W. Va. Code § 48-7-108.

### A. Equity Holdings Was Not a Bona Fide Purchaser Without Notice of the Whiteside Divorce Action and Ms. Varney's Claims to the Property as Part of the Divorce Action.

When Equity Holdings purchased Mr. Whiteside's one-half interest in the Property, it had actual notice of the Whiteside divorce action and Ms. Varney's claims against Mr. Whiteside and to the Property as part of the couple's divorce. Thus, Equity Holdings was not a bona fide purchaser without notice. As this Court recently explained:

> This Court long ago held that **"[a] bona fide purchaser is one who actually purchases in good faith."** Syl. pt. 1, Kyger v. Depue, 6 W. Va. 288 (1873). We have also described a bona fide purchaser of land as "'one who purchases for a valuable consideration, paid or parted with, **without notice of any suspicious circumstances to put him upon inquiry.**" Stickley v. Thorn, 87 W. Va. 673, 678, 106 S.E. 240, 242 (1921) (quoting Carpenter Paper Co. v. Wilcox, 50 Neb. 659, 70 N. W. 228 (1897)). See also Simpson v. Edmiston, 23 W. Va.

[1] West Virginia Code § 48-7-304 also provides the Court with authority to set aside "[a]ny . . . disposition of property to third persons, except to bona fide purchasers without notice for full and adequate consideration . . ." W. Va. Code § 48-7-304.

> 675, 680 (1884) ("[A] bona fide purchaser is one who buys an apparently good title **without notice of anything calculated to impair or affect it.**"); Black's Law Dictionary 1249 (7th ed.1999) (defining a bona fide purchaser as "one who buys something for value without notice of another's claim to the item or of any defects in the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.").

Subcarrier Communs., Inc. v. Nield, 624 S.E.2d 729, 737 (W. Va. 2005) (emphasis added).

At the time of purchasing Mr. Whiteside's interest in the Property on July 23, 2004, Equity Holdings and Kent George had actual knowledge of (i) the Whiteside divorce action (ii) Ms. Varney's claims against Mr. Whiteside, and (iii) her intent to offset her claims against Mr. Whiteside's interest in the Property. Of course, this is essence of equitable distribution.[2]

Counsel for Equity Holdings and Mr. George, its principal, were present at the January 7, 2004 bankruptcy hearing in which Ms. Varney submitted an upset bid for the Property. On numerous occasions during the hearing, the fact that the Whitesides were in the midst of divorce proceedings was mentioned. (See Transcript at 4, ll. 13-19). More importantly, counsel for Equity Holdings specifically acknowledged to the Bankruptcy Court that Equity Holdings and Mr. George were aware of the divorce action by stating that "Mr. Standish [the Trustee] specifically said, well, you have got to be careful, I think they are getting a divorce. It is not, you know, the whole pot is not his money." (Id. at 19). Finally, the deed between Mr. Whiteside and Equity Holdings included as an exhibit the Bifurcated Order from the Family Court granting the parties a divorce and scheduling equitable distribution for a final hearing. (See Equity Holdings Deed and Bifurcated Order).

Equity Holdings and Kent J. George were well aware of the divorce action and that Mr. Whiteside was trying to liquidate his interest in the Property before the Family Court had

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[2] At a minimum, Equity Holdings, based on the bankruptcy hearing, had notice of suspicious circumstances to put it and its principal upon inquiry notice as to Ms. Varney's claim to Mr. Whiteside's interest in the Property as part of the divorce settlement.

finalized equitable distribution. As stated by the bankruptcy trustee, "Mr. Whiteside was putting pressure on people to get it done, from what I understand, and he wanted his exemptions and they agreed to . . . front him [$5,000] . . . was my understanding" (Transcript, at 18). Equity Holdings, through counsel and through its representative, attended that bankruptcy hearing and heard Ms. Varney explain her interest in the Property and confirmed that awareness by the very deed conveying the Property to Equity Holdings.

Equity Holdings also had knowledge of Ms. Varney's claim to the Property as part of the divorce action. At the bankruptcy hearing, counsel for Ms. Varney stated that she intended to offset obligations that run from Mr. Whiteside to her as a result of this divorce action, against the amount that Mr. Whiteside otherwise would be entitled to receive upon a sale of the Property. (See Transcript at 11, 13-15) ("So regarding Mike Whiteside's one-half, as we indicated, they are in the middle of a divorce. There are obligations that run from Mike Whiteside to Connie Whiteside and so, she intends to offset obligations that are owing to her by her husband. . . [T]o the extent that she would have to pay money to Mike Whiteside for his one-half, [T]o the extent that Mike Whiteside owes money to her, then that would be an offset against what she would owe him. . ."

Thus, Equity Holdings had actual notice of (i) the Whiteside divorce action (ii) Ms. Varney's claims against Mr. Whiteside, and (iii) her intent to credit her bid for this Property against these claims. As a result, Equity Holdings had actual knowledge of Ms. Varney's equitable distribution claim, even if the term "equitable distribution" was not specifically mentioned during the bankruptcy hearing. Therefore, based on the actual notice that Equity Holdings had prior to the sale, Equity Holdings cannot now claim to have been a bona fide purchaser without notice when it purchased Mr. Whiteside's interest in the Property on July 23,

2004. Accordingly, the Family Court committed reversible error by concluding that Equity Holdings was a bona fide purchaser without notice. [3]

Relying on West Virginia Code § 48-7-108, Equity Holdings has argued that it was a bona fide purchaser because no order regarding equitable distribution had been entered and no notice of lis pendens had been recorded prior to the transfer. However, the fact that no notice of lis pendens had been recorded only relates to persons who lack actual notice. Equity Holdings had actual notice and thus cannot argue that it was a bona fide purchaser simply because no notice of lis pendens relating to the divorce action was filed. Only a "party ***without actual notice*** may rely upon record titles in the office of the clerk of the county commission . . . ." Wolfe v. Alpizar, 637 S.E.2d 623, 627 (W. Va. 2006)(emphasis added).

Courts in at least two jurisdictions have held that where there was actual notice of the pendency of a divorce action, the failure to file a lis pendens notice provided for by statute was irrelevant as to whether the person was a bona fide purchaser for value. See Breeding v. NJH Enters., LLC, 940 P.2d 502, 504 (Okla. 1997) ("[W]here there was actual notice of the pendency of such an action the failure to file the lis pendens notice provided for by statute is immaterial."); First Ala. Bank of Tuscaloosa, N.A. v. Brooker, 418 So. 2d 851, 856 (Ala. 1982) ("We find that because the Bank did have notice of the pending divorce action, or sufficient notice to put it on inquiry, it fails to fulfill the fourth element of a bona fide purchaser or mortgagee for value, and

[3] Moreover, the Mr. Whiteside's interest in the Property was apparently sold to Equity Holdings for $6,000.00. (See Equity Holdings Deed). Ms. Varney's upset bid for the Property in the bankruptcy proceeding was $18,400.00. (See Transcript at 18). This raises the issue of whether Equity Holdings paid full and adequate consideration for Mr. Whiteside's interest in the Property.

therefore cannot claim that status.").[4] These rulings are rooted in the common-law doctrine of lis pendens.[5]

The doctrine of lis pendens is an equitable doctrine, and the lis pendens statute is a codification of that doctrine. See Breeding, 940 P.2d at 504. However, "[t]hese statutes do not themselves create the law of lis pendens in the particular jurisdictions in which they are operative, but rather may be regarded as imposing limitations upon the common law doctrine otherwise existing upon the subject." Rardin v. Rardin, 102 S.E. 295, 297 (W. Va. 1919).

> [A]ccording to the common law doctrine of lis pendens, one who purchases from a party to a pending suit a part or the whole of the subject matter involved in the litigation takes it subject to the final disposition of the cause, and is bound by the decree or order that may be entered against the party from whom he derived title. . . .[L]is pendens is founded upon the necessity of such a rule to give effect to the proceedings of courts of justice. For without it the administration of justice might, in all cases be frustrated by successive alienations of the property which was the object of litigation, pending the suit, so that every judgment and decree would be rendered abortive where the recovery of specific property was the object. While some of the courts of other jurisdictions base the rule on the ground of publicity of legal proceedings, and a legal presumption of notice of what takes place therein, the great majority of such courts uphold the doctrine on the grounds of public policy and general convenience, recognizing that its existence and maintenance are necessary to any effectual administration of the law."

Central Trust Co. v. Harless, 152 S.E. 209, 211 (W. Va. 1930); Rardin, 102 S.E. at 297.

The Alabama Supreme Court's decision in Brooker is particularly instructive and persuasive because the court was faced with the same question now before this Court. In Brooker, the court considered the following issue: "whether a Bank, which has actual knowledge of (1) the fact that property is jointly owned by husband and wife and (2) the fact that a divorce action is pending between husband and wife, which prays for a division of the property, both real and personal, and accepts a mortgage on the husband's undivided interest

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[4] Although these cases concern whether the bank was a bona fide mortgagee, the same principles apply and elements are the same as bona fide purchasers for value. See 55 Am. Jur. 2d Mortgages § 308, at 55.

[5] "Lis pendens" is Latin for "a pending lawsuit." Black's Law Dictionary 950 (Bryan A. Garner, ed, 8th ed. 2004).

without the wife's knowledge or consent is a 'bona fide mortgagee' that takes title free from the effect of disposition of the property later made by the trial court in the divorce action." Id. at 854. Although no notice of lis pendens had been filed prior to the husband mortgaging his interest in the property, the court held that this was immaterial because the mortgagee had actual notice of the divorce proceeding prior to the creation of the mortgagee and therefore the mortgagee's interest was vulnerable to the outcome of the divorce action. See id. at 854.

Like the mortgagee in Brooker, Equity Holdings certainly had actual notice of the Whiteside divorce action, that the Property was jointly owned by Ms. Varney and Mr. Whiteside at the time, and that Ms. Varney had sought equitable distribution of the parties' martial property as part of the divorce action. Moreover, West Virginia Code § 48-7-108 does not prohibit application of the common-law lis pendens doctrine against one with actual notice, just because no statutory notice of lis pendens has been filed. The statutory lis pendens deals only with constructive notice. "It would be inconsistent to bind those with constructive notice of the pending action but not those with actual notice." First Midwest v. Pogge, 687 N.E.2d 1195, 1198-99 (Ill. App. Ct. 1997); see also Breeding, 940 P.2d at 504; Brooker, 418 So. 2d at 856. "The filing requirements of the lis pendens statute protect those without actual notice of the litigation from the sometimes harsh consequences of taking an interest in property during the pendency of litigation that may affect title to the property. ***Those with actual knowledge of litigation may not rely on a failure to give notice of that which they already know.***" Breeding, 940 P.2d at 505 (emphasis added). Therefore, based on Equity Holdings' notice of the divorce action, Equity Holdings is not a bona fide purchaser for value under W. Va. Code § 48-7-108. See First Ala. Bank of Tuscaloosa, N.A. v. Brooker, 418 So. 2d at 854; Breeding v. NJH Enters., LLC, 940 P.2d 502. Under the doctrine of lis pendens, Equity Holdings took its interest in the

Property subject to the Family Court's Final Order in which the Court ordered Mr. Whiteside transfer his interest in the Property to Ms. Varney.

**B. Mr. Whiteside's Transfer of His Interest in the Property Is Voidable Under West Virginia Code § 48-7-108 Because It Was Effected to Avoid Equitable Distribution.**

The second requirement for voiding a transfer under W. Va. Code § 48-7-108 is that transfer was effected to avoid the application of Article 7 of Chapter 48 or was a fraudulent conveyance. The Family Court's Order entered November 29, 2006, made no findings regarding whether Mr. Whiteside transferred his interest to deprive Ms. Varney of equitable distribution. (See Order entered Nov. 29, 2006). However, the evidence in the record demonstrates that Mr. Whiteside transferred the Property to deprive Ms. Varney of her right to equitable distribution. Based on the bankruptcy proceeding on January 7, 2004, and the documents of record in the divorce action, Mr. Whiteside, Equity Holdings, and Kent J. George knew that Ms. Varney was seeking to protect her right to equitable distribution of the marital estate with respect to the Property. In fact, at the hearing, the Bankruptcy Trustee advised the Bankruptcy Court that he "had concerns of my own at the time..." about what Equity Holdings was trying to do, and that "Mr. Whiteside was putting pressure on people to get it done, from what I understand, and he wanted his exemptions and they (Equity Holdings and Kent George) agreed to his – front him, to that extent, was my understanding." (Transcript at 18).

Moreover, Mr. Whiteside concealed from the Family Court that he had sold his interest in the Property to Equity Holdings and even misrepresented to the Family Court that he still retained possession of the Property during the January 5, 2005 final hearing. (See Final Order). Under West Virginia § 48-7-201 and -202, Mr. Whiteside was required to amend his asset disclosures on the record to the date of the hearing to show that he no longer held this asset. He

failed to do so. This further evidences that the transfer of the Property to Equity Holdings was done to frustrate Ms. Varney's equitable distribution rights.

Mr. Whiteside's transfer of his interest in the Property virtually eliminated the assets of the marital estate subject to equitable distribution. The net effect of the transfer was that Ms. Varney was denied equitable division of the parties' marital property as was provided for in the Family Court's Final Order dated February 1, 2005. Thus, this Court should reverse the Family Court's Order dated November 29, 2006, and set aside the transfer of the Property to Equity Holdings pursuant to W. Va. Code §48-7-304, thus giving effect to the Family Court's Final Order dated February 1, 2005.

## CONCLUSION AND RELIEF REQUESTED

In essence, the issue in this case is "Who has a claim against Michael Whiteside – Connie Varney or Equity Holdings?" The Bankruptcy Court answered this question before the Property was transferred, stating "You ("Equity Holdings") don't have a $5,000 investment in this property . . . Equity Holdings has a $5,000 investment in Michael Whiteside." (Transcript, at 15). Despite this admonishment, Equity Holdings took a deed to the Property and paid additional money to Mr. Whiteside with actual notice of Connie Varney's equitable distribution claim. Thus, Equity Holdings is not a bona fide purchaser. The Family Court committed clear error because it expressly found that Equity Holdings was a bona fide purchaser.

**WHEREFORE**, based upon the foregoing, Connie Sue Varney respectfully requests that this Court to (1) reverse the Family Court's Order of November 29, 2006, (2) set aside Michael B. Whiteside's July 23, 2004, transfer of his one-half interest in lots 62, 63, 64, 95 and 96 located at Wildwood Addition, Charleston, Kanawha County, West Virginia, to Equity Holdings, and (3) enforce the Family Court's Final Order dated February 1, 2005.

Respectfully submitted,
**CONNIE SUE WHITESIDE**
**n/k/a Connie Sue Varney,**
By Counsel,

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**THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**
**AT CHARLESTON**
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***IN RE* THE MARRIAGE OF:**

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**n/k/a Connie Sue Varney,**

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**MICHAEL B. WHITESIDE and**
**EQUITY HOLDINGS, LLC,**

Respondents.

## CERTIFICATE OF SERVICE

I, **STEVEN L. THOMAS**, hereby certify that on the 13th day of August, 2007, I personally served the foregoing **APPEAL BRIEF FOR CONNIE SUE WHITESIDE** upon the Respondents or counsel their counsel, by first-class mail at the following address:

Michael B. Whiteside
310 Wise Drive
Malden, WV 25306
*Pro Se*

and via hand delivery to:

W. Bradley Sorrells, Esq.
Robinson & McElwee PLLC
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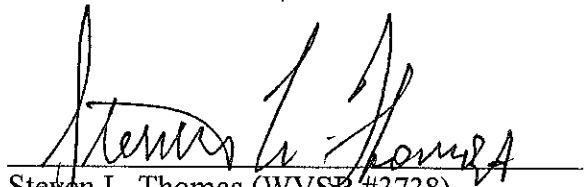

Steven L. Thomas (WVSB #3738)